Supreme Court, U. S.
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NO. 80-473

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

v.

VIOLET JO EVANS, INDIVIDUALLY AND AS TEMPORARY ADMINISTRATRIX OF THE ESTATE OF PAUL DAVID EVANS DECEASED, ET AL.,
Respondents,

On Petition For Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution is violated due to alleged lack of proper notice even though all parties are present at a hearing and are fully aware of the possible outcome.

OPINION BELOW

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, rendered on October 25, 1979, is reported at 590 S.W.2d 515.

JURISDICTION

The Court should deny this Petition for Writ of Certiorari for lack of jurisdiction due to two separate procedural errors committed by Petitioner below.

First, Petitioner failed to raise the issue of the alleged denial of the federal right of due process in the Texas state courts. The threshold procedural requirement for review by this Court is that the federal issue must have been raised in the state courts. *Cardinale v. State of Louisiana,* 394 U.S. 437 (1969). Since this requirement is jurisdictional, the burden of proof as to whether the federal question was presented to the state courts rests on the Petitioner. *Street v. State of New York,* 394 U.S. 576 (1969). Petitioner has wholly failed to meet its burden. In the jurisdictional section of its Petition, Petitioner nowhere points out where it allegedly raised the issue of denial of federal due process below.

The due process argument of Petitioner was an afterthought that first appeared on page four of its Motion For Rehearing in the Court of Civil Appeals for the First Supreme Judicial District of Texas. Petitioner there used the words "due process" but never alleged the denial of due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. When one looks at the manner in which Petitioner argued the alleged denial of due process in the Texas state courts, it is clear that it was presenting a *state* due process argu-

ment. Petitioner made vague references to the denial of due process but never mentioned the U.S. Constitution or even hinted that it was a denial of a federal right as opposed to a state right of which it complained.

This very issue of failure to specify the denial of a federal right has already been decided by this Court in *Bowe v. Scott,* 233 U.S. 658 (1914). *Bowe* involved an appeal through the state courts of Virginia by plaintiffs who sought to enjoin the enforcement of a city ordinance that would close an alley. Plaintiffs alleged United States Supreme Court jurisdiction because of alleged denial of due process. However, this Court found that it was never alleged in plaintiff's pleadings in the Virginia state courts that there had been a denial of the federal constitutional right of due process. Writing for the Court, Chief Justice White said:

> "But it is settled that such an averment, making no reference to the Constitution of the United States, and asserting no express rights thereunder, is solely referable to the state Constitution, which, in this instance, has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court. *Miller v. Cornwall R. Co.,* 168 U.S. 131, 42 L.Ed. 409, 18 Sup. Ct. Rep. 34; *Harding v. Illinois,* 196 U.S. 78, 49 L.Ed. 394, 25 Sup. Ct. Rep. 176." 233 U.S. 658, 665.

Since Article 1, Section 19 of the Texas State Constitution contains a due process clause, it is clear that Petitioners broad statements concerning denial of due process refer to state due process rather than federal. The *Bowe* case has been repeatedly followed by the U.S. Supreme Court in cases dealing with jurisdictional issues similar to that of the case at bar. *Wilson v. McLane,* 279

U.S. 822 (1928); *American Trust Co. v. McNinch,* 261 U.S. 606 (1922); *Armour & Co. v. New York, New Haven & Hartford R.R. Co.,* 250 U.S. 651 (1919); *O'Brien v. Public Service Commission of First District of New York,* 251 U.S. 537 (1919); *State of Missouri ex rel St. Joseph Hospital v. Geiger,* 235 U.S. 695 (1914); *Caldwell v. Bauer,* 238 U.S. 607 (1914). And since *Bowe* has never been overruled or distinguished on the points of jurisdiction and failure to state a denial of federal constitutional rights, it is clearly still the law.

Even if this Court were to hold that Petitioner had raised a federal rather than a state constitutional issue, Petitioner committed a second procedural error which, standing alone, is also sufficient to deprive this Court of jurisdiction in this matter. A claim of denial of federal rights under the United States Constitution is not adequately preserved if it is not presented to the state appellate courts in timely fashion with the clarity required by state appellate procedure. *Beck v. State of Washington,* 369 U.S. 541, 549-54 (1962). In order to have an issue considered by a Texas appellate court, state appellate procedure requires that it be stated in the brief as a point of error. Merely raising the issue as an argument without assigning it as a point of error is not sufficient. *Dial Temp Air Conditioning Company v. Faulhaber,* 340 S.W.2d 82 (Tex. Civ. App., Dallas 1960, writ refused, n.r.e.). Petitioner's due process argument was never presented as a point of error in any brief or pleading in the trial court or two appellate courts that considered this case. As stated previously, Petitioner first raised this issue as an argument only in its Motion For Rehearing in the Court of Civil Appeals. It is clearly the law in Texas

that no point should be considered in an appellate court which is raised for the first time in a motion for rehearing. *Aycock v. Travis County,* 255 S.W.2d 910 (Tex. Civ. App., Austin 1953, writ refused). Consequently, the issue of denial of state or federal due process was never before the Texas Court of Civil Appeals. Likewise, the issue was never properly presented to the Texas Supreme Court. That Court may only consider those questions of law raised by points of error in an application for writ of error. Rule 476, Texas Rules of Civil Procedure; *State Farm v. Cowley,* 468 S.W.2d 353 (Tex. 1971). The "due process" argument was not raised to the dignity of a point of error in the Application For Writ Of Error in the Texas Supreme Court.

In summary, Petitioner failed to timely and clearly present its due process argument under Texas appellate rules and therefore may not now assert such an argument in this Court.

STATEMENT OF THE CASE

Respondents feel compelled to give a detailed statement of the case due to the inaccurate statement made by Petitioner in its Petition For Writ Of Certiorari.

This is a wrongful death case brought under the Federal Employers Liability Act, 45 U.S.C. § 51 et seq. There were five pre-trial hearings in this case dealing with discovery matters. The hearings were held on August 22, 1977; July 31, 1978; November 27, 1978; November 29, 1978; and on December 4, 1978. Three different judges presided at these hearings including the Hon. George Miller, Hon. Charles Betts and Hon. Jack Smith. No record was made of any of these hearings and the

evidence offered to the trial court, if any, is not before this court. At the December 4, 1978 hearing the trial court granted an Interlocutory Default Judgment against the Petitioner on liability.

Respondents' deceased, Paul David Evans, was a track extra gang foreman employed by the Petitioner and was operating a motor car owned by Petitioner on Petitioner's tracks on April 18, 1976, near Burke, Angelina County, Texas. While making an inspection of Petitioner's tracks on that date, at a speed of about 15 m.p.h., the motor car derailed and Mr. Evans was killed. No one was with Mr. Evans on the motor car and no one apparently witnessed the derailment. Respondents contended that the motor car was defective and that the defects caused this derailment. Immediately following this occurrence, Petitioner sent numerous employees to inspect the motor car and the tracks and, as was later revealed in its Answers to Plaintiff's Interrogatories, a "consulting expert" named Dr. William H. Tonn, Jr., was employed and was present for the purpose of "obtaining his opinion as to how the occurrence made the basis of Appellee's claim took place." Since there were no eye witnesses to the occurrence and Petitioner was in possession of all of the evidence (the damaged motor car, the names of its employees and others who made inspections of the motor car and the scene and all records concerning the motor car), it was essential that Respondents obtain this information by interrogatories and follow that with depositions and an examination of the damaged motor car by experts employed by Respondents in order to establish Respondents' cause of action. With this background, Respondents submit that the following course of events took place in the discovery phase of this case:

1. Respondents-Plaintiffs' First Interrogatories to Petitioner-Defendant Southern Pacific Transportation Company were filed on June 21, 1977. Interrogatories Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 29, 30, and 31 inquired in detail about witnesses, prior and subsequent inspections and repairs on the motor car, experts, and the location of the motor car. (Tr. 13)

2. Petitioner-Defendant filed no objections to these Interrogatories and failed to file its Answers within the sixteen (16) days required by the Interrogatories.

3. Respondents-Plaintiffs where then forced to file a Motion to Compel Answers to Interrogatories And For Other Relief and a hearing was held on August 22, 1977. The Court granted Respondents-Plaintiffs' Motion. (Tr. 22)

4. On September 2, 1977, the trial court entered its Order ordering Petitioner-Defendant to answer the Interrogatories within thirty (30) days from the date of the entry of the Order or its pleadings *would be struck* and Petitioner-Defendant would not be permitted to present any grounds of defense. (Tr. 28)

5. Petitioner-Defendant did not file any answers to these Interrogatories within the thirty (30) days provided by the Order or by October 2, 1977.

6. Respondents-Plaintiffs then got out a notice to take the oral deposition of Norris L. Hastings, Claim Agent for Petitioner-Defendant, who had indicated that he was present at the scene immediately following the occurrence, and his oral deposition was taken on November 18, 1977. Defendant's counsel instructed Mr. Hastings to refuse to answer all questions with respect to who was present at

the scene following the occurrence, who inspected or repaired the motor car, and the current location of the motor car. (Tr. 29)

7. On March 29, 1978, more than eight (8) months after Respondents-Plaintiffs filed their Interrogatories and almost six (6) months after October 2, 1977, the expiration of the thirty (30) day period provided by the trial court's Order, the Petitioner-Defendant finally filed its Answers to Respondents-Plaintiffs' Interrogatories. (Tr. 31)

8. In answer to Respondents-Plaintiffs' Interrogatories Nos. 30 and 31, Petitioner-Defendant then informed Respendents-Plaintiffs for the first time that the motor car in question had been destroyed by Petitioner-Defendant and that "parts of the car were salvaged for spare parts". (Tr. 38)

9. On November 27, 1978 a hearing on Petitioner-Defendant's Motion To Set Aside The September 2, 1977 Order was held. The trial court overruled Petitioner-Defendant's Motion and reaffirmed the September 2, 1977 Order striking Defendant's pleadings and prohibiting it from presenting any grounds for defense.

10. On December 4, 1978, following a hearing on November 30, 1978, the trial court entered an interlocutory default judgment against Petitioner-Defendant.

After a jury trial on damages only, judgment was entered for Plaintiffs in the amount of $233,000.00. Petitioner-Defendant then appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas. That Court affirmed the judgment of the trial court. (App. A in Petitioner's Petition for Writ of Certiorari).

Defendants then filed an Application For Writ of Error in the Texas Supreme Court, which was refused with the notation "no reversible error."

Contrary to Petitioner's Statement of the Case, at no time in any of the above proceedings did Petitioner ever allege a violation of the Due Process Clause of the United States Constitution. It is also noteworthy to point out another omission in Petitioner's Statement of the Case. Before pursuing its cause in this Court, Petitioner filed a Motion to Stay Execution on the Judgment in the Court of Civil Appeals for the First Supreme Judicial District of Texas following the decision of the Texas Supreme Court. In order for such a motion to be successful, the movant must first show that the risk of irreparable injury would weigh most heavily on it by forcing it to pay the judgment prior to the disposition of its Petition for Writ of Certiorari in this Court. Secondly, movant must show that it is likely that four members of this Court would vote to grant the writ. *Buchanan v. Evans,* ____U.S.____, 99 S.Ct. 28 (1978). Petitioner was unable to convince the First Court of Civil Appeals of either proposition and its Motion was denied. (App. A).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction in this case for two reasons. First, Petitioner did not raise the federal constitutional question of denial of due process in the Texas appellate courts and therefore may not now do so. Secondly, in the state courts below Petitioner failed to raise its due process argument to the dignity of a point of error as required by state appellate procedure in order to preserve error.

Petitioner's claim is frivolous on the merits. It was well informed of all hearings in the trial court and well aware of the consequences and possible outcomes of the hearings. Petitioner at all times had an opportunity to be heard in a meaningful manner at a meaningful time.

ARGUMENT

Petitioner's case on the merits, apart from the jurisdictional questions, is frivolous and will not hold up under scrutiny. In essence, Petitioner argues that it had no notice that the trial court was going to strike its pleadings at the November 27, 1978 hearing. Petitioner is attempting to convince this Court that it was unprepared to defend against the possible confirmation of discovery sanctions even though the September 2, 1977 Order clearly set out the consequences of failing to answer the interrogatories within the prescribed time. Petitioner acknowledged the possibility of these consequences in its Motion To Set Aside Order Striking Pleadings.

In support of its argument, Petitioner is unable to cite a single case which indicates that the circumstances in the case at bar constitute a denial of due process. Instead, Petitioner cites cases such as *Mullane v. Central Hanover B & T Company*, 339 U.S. 306 (1950) and *New York v. New York, N.H. & H. RR. Co.*, 344 U.S. 293 (1953), in which this Court held that notice by publication was inadequate when other more reliable means were available.

Oddly enough, Petitioner also cites *Boddie v. Connecticut*, 401 U.S. 371 (1971), which supports Respondents' position here. In *Boddie*, this Court clearly articu-

lated its views on the meaning of the Due Process Clause of the Fourteenth Amendment:

> "Due process does not, of course, require that the Defendant in every single case actually have a hearing on the merits. A state can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor*, supra, 93 U.S. at 278, 23 L.Ed. 914, or who, without justifiable excuse, violates a procedure rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 351, 29 S.Ct. 370, 380, 53 L.Ed. 530 (1909). *What the Constitution does require is 'an opportunity . . . granted at a meaningful time in a meaningful manner,' Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (Emphasis added), *'for (a) hearing appropriate to the nature of the case,' Mullane v. Central Hanover Bank & Trust Company*, supra, 339 U.S. at 313, 70 S.Ct. at 657. *The formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the nature of the subsequent proceedings.* 401 U.S. 371, 378. (Emphasis added).

Under the rules stated in *Boddie*, supra, it can hardly be said that Petitioner was denied *"an opportunity . . . granted at a meaningful time in a meaningful manner"* to be heard on the subject of having its pleadings struck and being prohibited from presenting any defenses. In short, Petitioner knew what was going to happen at the hearing on November 27, 1978 if its Motion To Set Aside Order Striking Pleadings was not granted. Petitioner tried to suggest that there may have been other evidence it would have presented had it been given notice of the nature of

the hearing and even suggests that "(i)t is Petitioner's contention that the cause of its failure to answer the interrogatories within the time prescribed by the September 2nd order was said counsel's mental condition during that period." It should be noted that there were at least four full hearings on this matter and that at no time did Petitioner or its counsel ever present any such evidence. The first time this claim was made was in Petitioner's Reply To Respondents' Reply To Application For Writ Of Error in The Texas Supreme Court. At that point, Respondents, of course, had no opportunity to cross-examine any witnesses who might have been produced on that subject. Petitioner filed motions and briefs for each of these four hearings but now wants to claim that it somehow did not get notice and therefore did not have the opportunity to be heard. Respondents respectfully suggest that such a contention is without merit and frivolous under the circumstances.

Considering that there are two separate and distinct bars to this Court's jurisdiction and that Petitioner's argument on the merits is totally frivolous, Respondents respectfully request that this Court exercise its statutory discretion under 28 U.S.C. § 1912 and award Respondents double their court costs and attorneys fees incurred in replying to the Petition For Writ Of Certiorari.

CONCLUSION

Respondents respectfully pray that the Writ be denied and that they be awarded double their costs of court and attorneys fees incurred in the preparation of this brief.

Respectfully submitted,

SCHMIDT, MATTHEWS & BRANNON, P.C.

By: _____

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CERTIFICATE OF SERVICE

I, James H. Brannon, a member of the Bar of this Court do hereby certify that on the_____day of October, 1980, three (3) copies of the foregoing Brief For Respondent In Opposition were sent by certified mail, return receipt requested to Ben G. Sewell, Gordon A. Holloway and John E. O'Neill, counsel of record for Petitioner, at Sewell & Riggs, 900 Captial National Bank Bldg., Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

_____

JAMES H. BRANNON

APPENDIX A

COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT
Harris County Civil Courts Building
Houston, Texas 77002

July 16, 1980

Messrs. Sewell, Junell & Riggs
Hon. Gordon A. Holloway
900 Capital National Bank Bldg.
Houston, Texas 77002

Messrs. Schmidt & Matthews
Hon. Douglas Matthews
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Dear Sirs:

Re: 17427, Southern Pacific Transportation Company v. Violet Jo Evans Indv. & Temporary Administratrix of the Estate of Paul David Evans, Deceased, from Harris

Please be advised the Court today DENIED appellant's motion to stay execution on judgment in the above cause.

Respectfully,

MARIBELLE REICH, Clerk

/s/ KATHRYN COX, Deputy

MR:kc